Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

UNITED STATES, ex rel., RICHARD R. SYLVESTER,
Petitioners,
v.
NORTHROP GRUMMAN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the decisions below nullify the express provisions of a federal statute, 31 USC 3730(b), resulting in unconstitutional interference with the prosecurtorial discretion of the executive branch?

2. Do the decisions below effectively redraft the express provisions of a federal statute, 31 USC 3730(b), resulting in an unconstituional intrusion on exclusive legislative functions?

3. Is there an impermissible conflict with other circuits regarding conditions necessary for for release of an important federal right: dismissal of *qui tam* case without approval of the U.S. Attorney?

4. Does gross and outrageous attorney misconduct, with expressed intent to injure his client, produce an unconstitutional deprivation of due process?

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Cases

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Shielke v. Hafif, California Superior Court, Central District, BC 106737, filed June 13, 1994 15
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Leo Barajas v. Herbert Hafif, et al., California Superior Court, No. BC 086269, filed August 5, 1993 15

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American Jurisprudence (AmJur), Contracts, Vol 17 27
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PETITION FOR A WRIT OF CERTIORARI

Qui tam Plaintiff Richard R. Sylvester, both for the government and for himself, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered for the subject proceeding.

OPINIONS BELOW

The unreported opinion of the court of appeals is attached as Appendix A, 1a-7a. The court of appeals' order denying the petition for rehearing is attached as Appendix B, 8a-9a. The unreported opinion and decision of the district court is attached as Appendix C, 10a-11a.

JURISDICTION

The court of appeals entered its judgment on July 10, 1996, and denied Sylvester's petition for rehearing on September 25, 1996. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES

U.S. Constitution,

- Article I, section 1
- Article I, section 8
- Article II, section 1
- Amendment I
- Amendment V

10 U.S.C. 2324
18 U.S.C. 1001
31 U.S.C. 3730

STATEMENT OF THE CASE

Constitutional Issues

The fundamental issue is whether the Court's interpretation of 31 U.S.C. 3730(b) *interferes with the prosecutorial discretion of the executive branch*. The District Court dismissed the *qui tam*[1] action without the approval of the U.S. Attorney, which is required by the plain meaning of statute. The District Court and the Ninth Circuit relied on the *Killingsworth* case, which allows dismissal when the *qui tam* plaintiff refuses to litigate, but the Court dismissed this case when *both* the government and the *qui tam* plaintiff opposed dismissal.

Dismissal of a *qui tam* case requires approval by the U.S. Attorney, 31 U.S.C. 3730(b). Dismissal without this approval is contrary to the plain wording of the statute and substantially departs from fundamental principles of accepted statutory interpretation; thus, the plaintiff was denied substantive and procedural due process.

The decision appears to intrude on exclusive legislative functions. The Ninth Circuit interpretation of federal statute conflicts with the clear meaning. This decision and the *Killingsworth* decision are in direct conflict with the unambiguous wording of 31 USC 3730(b). In effect, the Ninth Circuit has effectively redrafted the statute. However, the judiciary is not authorized to perform legislative functions. Only Congress, not the Judiciary, has the power to write statutes: "... The Congress shall have Power... to make all Laws ... " *U.S. Constitution, Article. I, Section 8.* The Judiciary is authorized to

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[1] "*Qui tam*" is short for the Latin phrase "qui tam pro domino rege quam pro se imposo sequitur," translated as "who brings the action as well for the king as for himself," *U.S. ex rel Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir, 1993), footnote 3.

interpret the statutes, but the interpretation cannot depart so significantly from clear meaning and Congressional purpose that the statute is effectively cancelled.

Conflict with Other Circuits

The Ninth Circuit approved of the release of an important federal right without the strict scrutiny required to assure informed consent. This approach clearly conflicts with decisions in other federal circuits with give enhanced protection for release of a federal right. Significantly, no other circuits have adopted the Ninth Circuit's interpretation of 31 U.S.C. 3730(b); support for the *Killingsworth* case is conspicuously absent from all other circuits.

Course of Proceedings

In this action, appellant and *qui tam* plaintiff Richard R. Sylvester, represented by attorney Herbert Hafif, sued defendant Northrop Corporation. His claims, including statutory damages, were $234 million for *qui tam* claims for defective flight control electronics and $2.4 million for wrongful termination. Sylvester prevailed against Northrop's summary judgment motion and the case was ready for trial.

Sylvester signed a settlement agreement with detrimental reliance on attorney Hafif's promise to protect Sylvester's interests. However, Sylvester promptly rescinded the agreement after detailed review, based on lack of informed consent and fraud. Significantly, the settlement agreement allocated nothing for *qui tam* claims, but merely abandoned the *qui tam* claims, which allowed recovery by Northrop for all litigation expenses.

Sylvester directed Hafif to oppose dismissal. Also, the U.S. Attorney opposed the dismissal of qui tam claims. However, Northrop and Hafif obtained a dismissal over the objection of plaintiff Sylvester and the U.S. Attorney.

The District Court dismissed the case, based on the false representations by Northrop and Hafif. Due to the dismissal and without approval by the U.S. Attorney, the government lost the $234 million claim against Northrop and the government became obligated to pay Northrop an estimated $30 million in attorney fees and costs.

Northrop paid $825,000 for personal claims, with nothing paid for the valuable *qui tam* claims. Hafif kept $723,841 and gave Sylvester only $86,159.

Sylvester objected to the dismissal, and filed a Rule 60(b) motion to vacate the dismissal based on fraud on the Court. The Court declined to vacate the dismissal.

Sylvester appealed to the Ninth Circuit on the basis of lack of consent from the Attorney General, fraud on the government, and unconscionability. The Ninth Circuit denied the appeal.

Background Facts. *Qui tam* plaintiff Sylvester was employed for six years by Northrop Corporation as a senior advisor to top management at the B-2 Division, which developed and manufactured the stealth bomber under Air Force contract. Total cost to the government for the B-2 program was approximately $45 billion. Northrop falsely claimed $78 million payment for dangerously defective flight control electronics. Sylvester was terminated shortly after documenting the defects and warning top management of the necessity for disclosure and correction.

Based on fraud on the Court by Northrop and Hafif that resulted in dismissal, the government is now required to pay up to $30 million to Northrop and Sylvester's recovery is *de minimus*.

Sylvester is an economist, listed for over a decade in Marquis' *Who's Who in the World, Who's Who in Finance and Industry,* and *Who's Who in the West*. His education includes an M.B.A. from USC, a Ph.D. from UCLA, a J.D. from Loyola

Law School and postdoctoral studies in engineering at UCLA. (CR 419 at 2, ER 36 at 2.)

From April 18, 1983 to April 3, 1989, Sylvester was employed by Northrop as a Strategic Analysis Specialist in the Management Offices of the B-2 Division. During this time, Sylvester received favorable performance reviews. (CR 242 Ex N, ER 1.) Sylvester was terminated from Northrop shortly after writing a report to top management documenting critical flaws in the flight control system for the B-2 aircraft and the continuing cover-up. (CR 242 Ex A, ER 6; CR 242 Ex B, ER 3; CR 242 Ex J, ER 2.)

Defective Electronics. The power electronics system, designated the Actuator Remote Terminal (ARTS), is required to handle high electrical power without overheating and failure. The contract specification required an extremely low failure rate for ARTS. However, the design did not meet the contract specifications and failed repeatedly in bench tests and flight tests. (CR 242 Ex J, ER 2; CR 242 Ex A, ER 6.)

During his employment at Northrop, Sylvester wrote reports that documented Northrop's cover-up of the dangerously defective flight control electronics for the B-2 aircraft. The electronics could not be fixed without a major redesign that would delay first flight and would risk program cancellation. For years, Northrop billed the Air Force for the defective flight control system with full knowledge that the system did not meet and could never meet contract specifications for safety and reliability. (CR 242 Ex A, ER 6.)

False claims. The false claims by Northrop are knowing requests to the federal government for payment for design and fabrication of flight control electronics for the B-2 aircraft, the Actuator Remote Terminals(ARTS), which Northrop knew were defective, created unreasonable risk to the pilot's life, and failed to meet government contract requirements and specifications for

safety and reliability. (CR 137 at pages 35-38, ER 5 at pages 35-38; CR 242 Ex A, ER 6.)

Northrop failed to disclose to the government the fact that the electronics design was fatally flawed. Northrop falsified test results, took management action to prevent the government from being correctly informed concerning the defects, directed cover-up efforts to prevent employees from disclosing the defects to the government, presented false information to the government, and presented false claims for payment for the flight control systems knowing that the systems did not meet contract requirements and were defective. Damages to the government include $78 million for replacement and repair of the defective electronics. (CR 419 Ex B, ER 9.) By statute, Northrop liability to the government is treble the $78 million damages, or $234 million, 31 USC 3729(a).

The $78 million repair expense for ARTS was the direct result of failure to disclose to the government that the electronics design was inherently defective and could not foreseeably meet government specifications for safety and reliability. To prevent funding delays and possible program cancellation, Northrop prevented disclosure of these critical problems. Under the standards of 18 USC 1001, Northrop's failure to disclose with intent to induce belief was fraud, *U.S. v. Fern,* 696 F.2d 1269 (9th Cir. 1963). Northrop submitted claims for payment with knowledge that the claims were false because the designs and products did not meet contract requirements for safety and reliability, in clear violation of the false claims act, 31 USC 3729 *et seq*. (CR 242 Ex A, ER 6.)

Litigation. Sylvester retained attorney Hafif to file a *qui tam* suit, with statutory standing to represent the government. Sylvester's *qui tam* claim and wrongful termination claim prevailed against Northrop's motion for summary judgment and were ready for trial. (CR 204, ER 8.)

However, as the suit neared trial, Northrop and Hafif prepared a settlement agreement with unconscionable results. The settlement agreement falsely stated that the *qui tam* claims were undermined.

Sylvester was *not* given the document to read on June 23, 1994 prior to signing. Sylvester first received a copy to retain and read only after a full week delay. (CR 419 at 6-7, ER 36 at 6-7.) Sylvester placed his trust in Hafif, acting in the role of fiduciary, to protect government interests and Sylvester's interests. (CR 419 at 8, ER 36 at 8.)

Promptly after receiving a copy of the settlement agreement to read and discuss with several attorneys, Sylvester rescinded the settlement agreement based on fraud, undue influence, oppression, and lack of informed consent. (CR 419 at 9, ER 36 at 9; CR 419 Ex C, ER 19.)

Unconscionable settlement agreement terms. The effect of the dismissal is unconscionable. Without government consent, the $234 million Northrop liability to the government was cancelled, and the government must pay Northrop full litigation costs, estimated at $30 million. Northrop and Hafif failed to disclose to the Court the true financial effect on the government.

Significantly, Northrop fails to disclose the actual costs that would be reimbursed (Northrop brief, p. 22, footnote 12). Northrop fees and costs are *estimated* from the $29.2 million in attorney fees and costs for a similar fraud case, *Appeal of General Dynamics*, Armed Services Board of Contract Appeals, No. 39500 and 40995, 92-1 B.C.A.(CCH) P24,657, Dec. 16, 1991.

The Court dismissed the qui tam claims as abandoned. Thus, the government loses the $234 million claim, including treble damages, for payment of false claims for Northrop's defective electronics, and Northrop's attorney fees to support the fraud without government agreement and contrary to public policy.

As fraud, Hafif and Northrop failed to inform Sylvester or the Court of the unconscionable effect of the agreement. (CR 399 Ex. C, ER 15.)

(**a**) The Government would get nothing, but the government would be obligated to pay Northrop an estimated $30 million for all attorney fees, costs and damages paid as allowable costs on the B-2 defense contract, 10 USC 2324(e)(1)(C).

(**b**) The settlement agreement *falsely* stated that "... Plaintiffs believe that further prosecution ... of ... *qui tam* claims is ... unlikely to succeed given that discovery ... has shown that these allegations have been seriously undermined ...." (CR 399 Ex. C, ER 15, page 1.) This abandonment of the *qui tam* claim, which results in the government obligation to pay Northrop for litigation costs.

Outrageous attorney conduct. As attorney for a *qui tam* relator, Hafif had an affirmative duty to protect government interests. Furthermore, as an officer of the Court, Hafif has a duty to prevent fraud on the Court. Hafif was obligated to zealously protect client Sylvester's interests. However, Hafif's wrongful intent is clearly shown by Hafif's admission to attorney Melvin Belli prior to the dismissal that he intended to work against Sylvester's interests. Hafif's outrageous conduct toward client Sylvester is shown by Hafif's words, witnessed by three attorneys:

> ...I'm going after the (expletive deleted). I'm not going to let him live...
> (CR 399, ER 26 page 5 line 3.)

In Court, Hafif argued against the government's interests and Sylvester's interests. At the August 29, 1994 hearing, Northorp and Hafif failed to disclose that Sylvester had rescinded, and that Sylvester had directed Hafif to oppose the motion to dismiss. (RT 8/29/94, ER 23.)

As the attorney for a *qui tam* relator, who stands in the shoes of the government, Hafif was obligated to protect government interests. However, Hafif worked against government interests. Hafif's actions to dismiss the *qui tam* claim are void due to gross misconduct. Overall, Hafif's failure to represent the interests of the government and of Sylvester invalidate the settlement agreement and the dismissal.

Northrop and Hafif prevented recovery of damages by Sylvester. Now age 58, Sylvester faces retirement with minimal assets and income due to Northrop's retaliatory termination, the conspiracy by Northrop and Hafif to abandon the valuable *qui tam* claims, and Hafif's misappropriation of 87 percent of the $825,000 paid for settlement of personal claims.

Statutory Purpose to Correct Fraud

The *qui tam* statute is intended to correct rampant waste, fraud, and abuse in the defense industry. Since public funds are involved, government contractors must adhere to formalities and requirements of law. The obligation to deal truthfully with the government has been stated by the Supreme Court: "Men must turn square corners when they deal with the Government," *Rock Island, Arkansas & Louisiana Railroad Company vs. U.S.*, 254 U.S. 141, 143, 65 LEd 1898, 41 SCt 55 (1920). By contrast, Northorp has failed to turn square corners. Through deception, mischaracterization, and fraud, Northrop seeks to evade the provisions of the False Claims Act and the Major Fraud Act.

The False Claims Act was established by Congress during the Civil War in response to reports of widespread fraud, corruption and abuse.[2] The False Claim Amendments Act of 1986 (P.L. 99-562) was enacted to enhance the Government's

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[2]*Cong. Globe*, 37th Cong., 3rd Sess. 952 (1863)

ability to recover losses sustained as a result of fraud.[3] Congress passed the 1986 amendments due to increasing frustration with the inability of the Department of Justice to control defense industry fraud.[4] To prevent reimbursement of attorney fees, costs, and settlement payments, Congress passed the Major Fraud Act of 1988 (P.L. 100-700), applicable to contracts awarded after November 19, 1988.

Northrop's Fraud on the Court

Fraud by Northrop included false claims for defective goods, cover-up of the defects, and failure to disclose to the court the financial effect on the government caused by the deceptive settlement agreement and dismissal.

Northrop made false claims for defective goods, resulting in a $78 million fraud on the U.S. due to dangerously defective flight control electronics on the B-2 aircraft. Under the False Claims Act the government has valid claims of $234 million, including statutory treble damages.

Due to failure to disclose, Northrop deceived the District Court. Due to deceptive wording in the settlement agreement, the government got nothing and Northrop evaded the provisions of the False Claims Act and the Major Fraud Act which were intended to prevent payments for fraud.

The false wording in the settlement agreement mischaracterizes the *qui tam* action as abandoned, instead of as compromised. For an abandoned and dismissed claim, the government must reimburse Northrop attorney fees as an allowable cost under the cost-plus government contract.

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[3]*Criminal Defective Pricing and the Truth in Negotiations Act*, Inspector General, Dept. of Defense, March 1988, page 7, note 11.

[4]John Phillips and Richard A. Sauber, *Qui Tam Litigation*, Prentice Hall Law and Business, 1991, p. 3.

The unconscionable effect is that without government consent the government must abandon their $234 million claim and Northrop will obtain complete recovery for all costs associated with defense of their fraud.

Northorp and Hafif failed to disclose the full text of the agreement to Sylvester until after signature. The full text of the agreement was not given to Sylvester until one week after signature of the final page. Promptly upon reading the full agreement, Sylvester rescinded based on fraud and lack of informed consent and demanded that Hafif oppose the dismissal. Northorp was fully aware of the rescission and demand for opposition.

In fraud on the Court, Northrop and Hafif failed to disclose to the Court that Sylvester opposed dismissal. After dismissal, the District Court declined to issue an opinion on a Rule 60(b) motion to correct the error due to fraud on the Court.

In fraud, Northrop failed to disclose in the terms of the settlement agreement the *unconscionable results* that the government would be obligated to pay Northorp for all litigation costs, estimated at $30 million, to defend the fraud claim.

The full costs for defense for a fraud case are allowed as an indirect expense on a defense contract, if the fraud case is abandoned, 10 U.S.C. 2324(e)(1)(C). By contrast, if the case is settled by payment of damages for fraud, the litigation costs are not reimbursed by the government.

Thus, the terms of the settlement agreement resulted in continued fraud, by requiring government payment for Northrop's legal fees and costs.

Unconscionable Result

The settlement agreement and resulting dismissal has an unconscionable effect. An agreement with unconscionable effect is void *ab initio*. A void agreement cannot be ratified by any act. The false settlement agreement and resulting dismissal of the *qui*

tam action is unconscionable and a violation of public policy. The unconscionable effect of the settlement agreement is demonstrated by the results. Without consent, the government was forced to abandon $234 million in valid *qui tam* claims. Without consent, the government must pay Northrop litigation costs. (CR 419 at 12, ER 36 at 12)

Unconscionability is recognized as a justification for the Court make the entire contract void or to enforce any part of a contract, *Restatement 2d, Contracts*, sec. 208. Gross disparities in the values exchanged may be an important factor in determination that a contract is unconscionable, *Restatement 2d, Contracts*, comment c. Also see: UCC 2-302 which is reflected in *Cal. Civ. Code* 1670.5, and B. E. Witkin, *Significant Developments in California Substantive Law*, 1970-1990, pp. 10-17.

The total circumstances indicate unconscionability, such as hidden terms, unfair surprise, and lack of justification for a one-sided result, *A&M Produce Co. v. FMC*, 135 CA3d 473, 186 CR 114 (1982).

Violation of Public Policy

Public policy discourages government payment for attorney fees and costs for settled fraud cases. An agreement contrary to public policy is void. The settlement agreement and dismissal are void due to violation of public policy. Public policy prevents payment for attorney fees to defend contractor fraud.

Furthermore, the wording of recent statutes and regulations is designed to prevent allowability under deceptive terms in settlement agreements. Under statute applicable before November 26, 1988, payment for costs in defense of fraud are prohibited if the contractor is found liable, 10 USC 2324(e)(1)(C),(D).

Because payment for fraud is unconscionable, Congress passed a new statute to prevent legal fees and costs from being an

allowable costs for dismissed cases. The Major Fraud Act of 1988 (P.L. 100-700) included a key provision designed to prevent unconscionable settlements that would result in recovery of contractor attorney fees and damages paid as an allowable cost under a defense contract:

> Costs incurred ... are not allowable as reimbursable cost ... if ... a disposition of the proceeding by consent or compromise ... could have resulted in a disposition described... , 10 USC 2324(e)(1)(C), (k)(2)(E), emphasis added.

The present regulations governing legals fees and costs were prompted by this new statute. Unallowability was extended to legal proceedings and to in house personnel costs to defend fraud. See: John Cibinic Jr. and Ralph C. Nash, Jr., *Cost-Reimbursement Contracting*, Second Edition, George Washington University, 1993, pp. 823-828.

Critical issues of federal law

The primary issue is whether a qui tam claim may be dismissed without the consent of the government, when qui tam plaintiff Sylvester is also opposed. Relevant statute *prevents* dismissal of a qui tam claim without approval of the U.S. Attorney, 31 USC 3730(b). The Ninth Circuit cites *U.S. ex rel Killingsworth v. Northrop*, 25 F.3d 723 (9th Cir 1994), as allowing dismissal if the plaintiff refuses to litigate, but the case is not followed by any other circuit and *Killingsworth* does not give authority to dismiss when both plaintiff Sylvester and the government opposed dismissal.

The secondary issue is whether client Sylvester is bound by unauthorized acts by attorney Hafif. Hafif acted to dismiss the qui tam case *contrary* to Sylvester's written substantive direction. Prior to the dismissal, Sylvester directed attorney Hafif to oppose dismissal. However, as fraud on the Court, Hafif failed to

disclose Sylvester's opposition to the Court. By Rule 60(b) motion, Sylvester informed the Court of fraud on the Court by Northrop and Hafif, but the Court declined to vacate the dismissal.[5]

In fraud on the Court at the dismissal hearing, Northrop falsely represented " .. counsel has the authority ... to settle the case on behalf of their clients." (Northrop ER Ex C). Northrop failed to disclose to the Court their knowledge that Sylvester had rescinded and opposed dismissal.

Attorney authority to settle is rebuttable, *Gagnon Co. v. Nevada Desert Inn, Inc.*, 45 Cal.2d 448, 289 P.2d 466 (1955). The client has control over substantive matters including the right to control the terms of a settlement. The attorney cannot bind his client by an act that gives up the client's substantive right unless the attorney acts under actual authority, *Linsk v. Linsk*, 70 C2d 272, 74 CR 544, 449 P2d 760 (1969). Informed client approval is necessary to compromise or dismiss a case, *Bice v. Stevens*, 160 CA2d 222, 231, 325 P2d 244,250 (1958). Hafif's authority was clearly rebutted by Sylvester's clear written direction requiring Hafif to oppose the dismissal. A client is not held responsible for acts by an attorney that are grossly irresponsible. These unauthorized acts are deemed void. These acts of positive misconduct are not imputed to the client, *Daley v. County of Butte*, 227 CA2d 380, 38 CR 693 (1964).

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[5]The Court may take judicial notice that the attorney-client issues of malpractice by Hafif are being litigated in state Court: *Dane, Ottaviano and Sylvester vs. Hafif*, California Superior Court, Central District, Case No. 127973, scheduled for trial January 15, 1997.

As evidence of Hafif's questionable *modus operandi*, the Court may take judicial notice of several cases in California Superior Court concerning Hafif's claimed misappropriation of proceeds. See: *Jones and Schielke v. Hafif* No. BC 098080, *Shielke v. Hafif* BC 106737, *Killingsworth v. Hafif* BC 091845, *Barajas v. Hafif* BC 086269.

REASONS FOR GRANTING THE PETITION

I

The decision raises significant Constitutional issues of executive branch discretion, due process, freedom of speech, and supremacy.

Executive branch discretion. The Ninth Circuit's interpretation of 31 USC 3730(b) allows dismissal when both the government and the qui tam plaintiff oppose, although counsel for the plaintiff and defendant seek dismissal. This interpretation is contrary to the wording of the statute and is not authorized by *Killingsworth*. Furthermore, this liberal ground for dismissal appears to violate fundamental constitutional requirements. The constitutional foundation of the False Claims Act requires that there is no undue interference with the prosecutorial discretion of the executive branch, *U.S. ex rel. Taxpayers Against Fraud and Walsh v. General Electric*, 41 F3d 1032, 1041 (6th Cir. 1994); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F3d 743, 754 (9th Cir. 1993), *cert. den.* 127 L.Ed 2d 433, 114 S.Ct 1125 (1994).

Although the qui tam claim was valuable, with $245 million damages due to the government and the case ready for trial, the case was dismissed over the objection of the U.S. Attorney. This dismissal impermissibly intrudes on the prosecutorial discretion of the executive branch by removing the safeguard provided by statute, 31 USC 3730(b). Thus, the Ninth Circuit's interpretation appears to violate Constitutional requirements by removing executive discretion.

Due process. It is fundamental that due process requires representation by counsel, *Gideon v. Wainright*, 372 U.S. 336 (1963). This basic right was stated in an early case: "... the right to the aid of counsel is of this fundamental character...," *Powell*

v. Alabama, 287 U.S. 45, 68 (1932). Gross malpractice, breach of the duty of loyalty, or dismissal contrary to client interests results in *denial of due process*. Hafif refused to follow Sylvester's directions and argued against client Sylvester's interests in Court. Thus, due to Hafif's intentional misconduct, Sylvester was denied effective counsel necessary for due process.

The dismissal reflects lack of due process. In fraud, both Northrop and Hafif intentionally failed to disclose that Sylvester opposed dismissal; Northrop and Hafif falsely claimed that Hafif was authorized to dismiss the case. The dismissal was based on fraud upon the Court, but the Court declined to correct the error despite Sylvester's Rule 60(b) motion.

The decision below sanctioned outrageous conduct by an attorney, which prevents due process. Hafif refused to follow Sylvester's directions to oppose dismissal. Hafif argued against client interests in Court. Hafif structured the settlement terms to misappropriate 87 percent of the proceeds. Thus, fraud on the Court by Northrop and Hafif prevented due process.

Freedom of Speech. Sylvester was denied freedom of speech because the *qui tam* statute is designed to allow freedom to report fraud without retaliation. However, the Court chilled freedom of speech by preventing recovery of Sylvester's damages incurred due to his reporting of fraud.

Supremacy. In case of conflict, federal law is supreme to state law, *U.S. Constitution, Article VI.* However, the Ninth Circuit applied state contract law to the settlement of a federal claim, wherein federal law requires a higher level of scrutiny.

The Ninth Circuit failed to apply supreme federal law by holding that settlement agreements are governed by state contract law, which provides that rescission is possible only if the signature is fraudulently induced by the other contracting party.

However, relevant federal law demonstrates that when a settlement agreement concerns a federal right, there is a higher level of scrutiny. Under state law, rescission may be based on fraud exercised with connivance of the opposing party or any other party jointly interested.

II

The decision conflicts with decisions of other Circuits

The Killingsworth decision is not followed by other circuits

Significantly, only the Ninth Circuit allows dismissal of a *qui tam* case when the government objects to dismissal. By contrast, other circuits require strict scrutiny for release of a federal right.

The literal wording of 31 USC 3730(b) requires government approval for dismissal. The *Killingsworth* exception applies only if the *qui tam* plaintiff requests dismissal.

The *Killingsworth* case allows dismissal without the approval of the U.S. Attorney, if the plaintiff refuses to litigate. The Ninth Circuit held that lack of government consent required by 31 USC 3730(b) does not bar dismissal, due to the exception noted in *Killingsworth v. Northrop*, 25 F.3d 715, 723 (9th Cir. 1994).

At the time of the hearing, both the government and the *qui tam* plaintiff Sylvester opposed dismissal. The Court was misled due to failure to disclose by Northrop and Hafif.

Significantly, the *Killingsworth* exception does not apply because plaintiff Sylvester opposed dismissal and gave clear written directions to attorney Hafif to oppose dismissal. The dismissal was based on fraud upon the Court because Northrop and attorney Hafif failed to disclose Sylvester's opposition. Prior case law shows no other circuit allowing dismissal under these circumstances. No other circuit relies on the *Killingsworth*

exception to force dismissal contrary to specific government request.

Strict scrutiny is required for release of a federal right.

Decisions from other circuits hold that signature to release a federal claim is void without several days of detached reflection, sufficient time to consider release terms, the plaintiff participation in the wording of the release, *Ross v. Arcata Graphics Co*, 788 F.Supp 788 (WD NY, 1992). Sufficient time for detached reflection is defined as several days, not promptly after initial document preparation, *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987).

By contrast, the Ninth Circuit held that because Sylvester had signed the settlement agreement, disavowal was prevented, and that fraud merely results in an attorney-client claim.

Mere signature is insufficient to release claims provided by federal statute. A purported waiver of a federal remedial right is not to be taken lightly; mere signature does not establish a knowing, voluntary relinquishment of rights, *EEOC v. U. S. Steel*, 583 F.Supp 1387 (WD Pa 1984); *Valenti v. International Mill Service, Inc.*, 634 F.Supp 57 (ED Pa 1985). Unless authorized by federal rule, a purported release or waiver of rights granted under federal statute is deemed void as against public policy, *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987).

III

The Decision Nullifies an Important Federal Statute

The decision departs from settled principles of statutory construction

It has long been settled that "[t]he most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent," *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers*, 414 U.S. 453, 458 (1974).

> Statutes should not be construed so as to make mere surplusage of any of the provisions...
> *Pettis ex rel. United States v. Morrison Knudsen Co*, 477 F.2d 588, 673 (9th Cir. 1978)

In this case, the legislative intent is to allow recovery of damages to the government due to fraud and to make the qui tam plaintiff whole. The Ninth Circuit's decision fails to support the legislative purpose and the decision produces an unconscionable result.

The Attorney General opposed dismissal

By statute, formal approval of the Attorney General is required to dismiss *qui tam* claims, 31 USC 3730(b). The record clearly shows that the U.S. Attorney opposed abandonment of the *qui tam* claims. The hearing to overcome government objection failed to meet Killingsworth standards of an evidentiary hearing to consider the value of the abandoned claim.

Under *Killingsworth*, the Court is authorized to bar a *qui tam* settlement which is artificially structured to deny the government its proper share of the settlement proceeds; the Government retains the right to object even if the Government does not intervene in the action, U.S. ex rel. *Killingsworth v. Northrop*, 25 F3d 715 (9th Cir. 1994). As a *qui tam* relator, Sylvester has standing and an affirmative duty to protect government interests. As attorney for Sylvester, Hafif cannot undermine this obligation to the government.

Abandonment of the *qui tam* cause of action is void *ab initio* due to lack of written consent by the Attorney General and improper allocation of proceeds in violation of 31 USC 3730(d)(2). The dismissal is void by statute because the action cannot be dismissed without written consent of the Attorney General, 31 USC 3730(b).

However, under *Killingsworth*, if the parties agree to settle, the government does not have an absolute right to block the

settlement, but the government has a right to a hearing to object to a proposed settlement, so that the district Court can determine if the settlement is fair and reasonable, *U.S. ex rel. Killingsworth*, 25 F.3d 715, 725 (9th Cir 1994), interpreting 31 USC 3730(c)(2)(B).

In *Killingsworth*, only the government objected. By contrast, in this case both the government and plaintiff Sylvester objected. Sylvester objects for himself and for the government. Hafif's actions as agent for Sylvester are void; Hafif clearly failed to represent Sylvester's substantive directions.

The qui tam plaintiff has authority to prosecute the claim and oppose dismissal. Sylvester has statutory authority as a *qui tam* plaintiff representing the government to require that the case go to trial, 31 USC 3730(c)(3). Under terms of the settlement agreement, the valuable *qui tam* claims are abandoned without consideration. The abandonment of the valuable qui tam claims is void by public policy. Sylvester stands in the shoes of the government to prosecute the *qui tam* claim.

By statute, dismissal requires formal written approval by the government.

> The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting, 31 USC 3730(b).

The Killingsworth exception does not apply

There are only two conditions that allow abandonment of the qui tam claim: (1) with written permission of the U.S. Attorney (2) if the plaintiff seeks dismissal, after a hearing to establish fair value.

However, this case, *qui tam* plaintiff Sylvester opposed dismissal at the time of the hearing, and directed his attorney to oppose the dismissal. As blatant malpractice, Attorney Hafif refused to follow directions. Northrop and Hafif failed to inform

the court that dismissal was not possible because Sylvester opposed dismissal.

The Killingsworth exception requires that the plaintiff seeks to dismiss; by contrast, Sylvester opposed dismissal. Although a *qui tam* plaintiff cannot be forced to continue to litigate, he has the right to conduct the action until the government elects to intervene, 31 USC 3730(c)(3).

Under Killingsworth, a hearing is required if the *qui tam* plaintiff seeks to dismiss but the government objects. The hearing must be based on whether the compensation to the government is: "fair, adequate, and reasonable" based on a "fair appraisal of the value of his case," *U.S. ex rel. Killingsworth,* 25 F.3d 715, 725 (9th Cir. 1994).

> ... We construe the Act as authorizing the district court to bar a qui tam plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the settlement proceeds .... *U.S. ex rel. Killingsworth*, 25 F.3d 715, 724 (9th Cir. 1994), (emphasis added).

The *Killingsworth* exception does not apply because Sylvester opposed the dismissal at the time of the dismissal hearing. Prior to the dismissal hearing, Sylvester rescinded the settlement agreement and directed Hafif to oppose dismissal. At the dismissal hearing, in fraud upon the Court, Northrop and Hafif failed to disclose Sylvester's rescission and opposition to the Court (CR 399 Ex O, ER 44).

Although there was a hearing after government objection, the hearing failed to meet Killingsworth requirements. The "hearing" did not include any required evidence regarding the adequacy of the settlement in comparison with the $234 million qui tam claim (CR 388, ER 25). The "hearing" failed to consider the critical issue of adequate value for the abandoned claim, and therefore violated even the relaxed standards of *Killingsworth*.

IV

The decision below raises important questions of federal law.

The decision conflicts with Congressional intent

The Congressional intent for the False Claims Act was to prevent fraud for government contracts. However, this decision actually rewards a contractor for fraud by paying all legal fees for defense, if the settlement agreement abandons the claims.

The Ninth Circuit's opinion, if allowed to stand, will impair the Congressional intent to prevent major fraud in government contracts and to make whole the *qui tam* plaintiff. Furthermore, the Ninth Circuit's opinion contravenes well-settled principles of statutory construction, *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 804 (9th Cir. 1989).

As a result of the dismissal without government approval, Northrop escapes all penalty for their $78 million false claim for defective electronics, and the government must pay an estimated $30 million for Northrop to defend the fraud. The objectives of the False Claim Act to make the relator whole are not met. After reporting Northrop's fraud, Sylvester was terminated and lost substantial future income and benefits. Sylvester was not made whole; Sylvester received only $86,159 from the $825,000 settlement. This unconscionable result is clearly contrary to the Congressional intent.

Thus, based on this case, a government contractor would have a financial incentive to defraud the government, because a settlement agreement and dismissal could be designed to require the government to pay for all costs for legal defense, even for criminal fraud.

Unconscionable results void dismissal

Public policy prevents unconscionable results. An agreement is void if unconscionable or in violation of public

policy. By law, an agreement that is grossly unfair to the government is unconscionable and void.

A settlement agreement is void *ab initio* if the terms are contrary to the public interest. A settlement agreement that is not in good faith is void. A dismissal based on the void settlement agreement is void.

To determine good faith, the court must look to whether the settlement figure is out of proportion to the plaintiff's probable recovery, *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 C3d 488, 213 CR 256. Minimal or zero compensation is evidence of bad faith, *Gehl Bros. Mfg. Co. v. Superior Court*, 183 CA3d 178, 228 CR 19.

Substantive unconscionability occurs when the contract terms result in overly harsh, one-sided results, unreasonable, or unexpected, *A&M Produce Co. v. FMC Corp.* 186 CR 114, 121-22; *Premier Wine & Spirits v. E. & J. Gallo Winery*, 644 F.Supp 1431, 1440 (ED Cal 1986). A court may refuse to enforce that portion of a contract that is unconscionable, *Rest.2nd, Contracts 208, Cal Civ Code 1670.5.* "...Contracts which have for their object ... to exempt anyone from responsibility for his own fraud ... are against the policy of the law," Cal Civ Code 1668. "A party to a contract may rescind the contract ... if the public interest will be prejudiced by permitting the contract to stand," Cal Civ Code 1689(b)(5). This decision results in loss to the government of a $234 million government claim, plus the hidden obligation of the government to reimburse Northrop for litigation costs.

By law, an agreement that is grossly unfair to the government is unconscionable and void. Under terms of the settlement agreement, the *qui tam* claim is abandoned. As a result, the government fails to recover the valid $234 million qui tam claim and the government is required to pay to Northrop an estimated $30 million for defense of Northrop's fraud, as an allowable cost under a defense contract, 10 USC 2324(e)(1). The

result is overly harsh, one-sided, contrary to statute, contrary to public policy, and is clearly unconscionable.

However, in this decision, contrary to dominant federal law, the Ninth Circuit held in this case that public policy does not prevent enforcement of a settlement agreement even if the agreement is unfair to the government.

The government policy against cost allowability for fraud has been clearly stated in a recent pending Northrop case, *Appeal of Northrop Worldwide Aircraft*, Armed Services Board of Contract Appeals, ASBCA Nos. 45216, 45877, 95-1 B.C.A. (CCH) P27,503 at page 14, (February 15, 1995).

The government is the real party of interest even if the *qui tam* plaintiff prosecutes the action for the government, *U.S. ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992), cited in *Killingsworth*, at p. 720. The government is not required to intervene to prevent dismissal, 31 USC 3730(b).

Agreement terms that violate public policy are void. A contract that has for its object to exempt anyone from responsibility for his fraud is against public policy, *Blankinheim v. E.F. Hutton & Co.*, 217 CA3d 1463, 1472-1473 (1990).

Public policy against fraud takes precedence over case law favoring settlements. The fundamental public policy of substantial fairness, due process, and avoidance of fraud take clear precedence over case law favoring settlements, *Elbaor v. Smith*, 845 SW 2d 240, 250 (Tex 1992).

Outrageous attorney misconduct voids dismissal

Acts by an attorney that are so grossly irresponsible that they constitute positive misconduct are not imputed to the client, *Daley v. County of Butte*, 227 CA2d 380, 38 CR 693 (1964).

Sylvester directed Hafif to oppose the dismissal; Hafif refused (CR 399 Ex G, ER 46; RT 8/29/94, ER 23). Plaintiff's attorney has no inherent or implied authority to dismiss the

action without the client's consent, *Blanton v. Womancare, Inc.*, 38 C3d 396, 212 CR 151 (1985). Because attorney Hafif refused to follow written directions by Sylvester to object to the dismissal, the dismissal is void by operation of law, due to lack of due process.

Due process is impossible when the attorney actively works against client interests. Even if the party is sophisticated and capable, fair hearings are impossible without a lawyer to assist, *Gideon v. Wainwright*, 372 U.S. 335 (1963). As grossly irresponsible and outrageous conduct, Hafif actually worked against client Sylvester's interest, boasting to Melvin Belli before the dismissal hearing that he intended to injure Sylvester (CR 399 ER 26 p. 5).

As outrageous attorney misconduct, the dismissal was based on fraud on the court. Northrop and Hafif failed to disclose to the court that Sylvester opposed the dismissal, voiding the *Killingsworth* exception to dismissal without Attorney General approval. The underlying settlement agreement, based on fraud, was promptly rescinded. Rescission may be based on fraud exercised with connivance of the opposing party or any other party jointly interested.

Fraud is an obvious exception to the rule that signature prevents escape from liability under contractual terms, Witkin, *Summary of Calif. Law*, 1973, p. 93. Apparent consent is not real when obtained through fraud or mistake, Cal Civ Code 1567. Fraud includes a failure to disclose, 18 USC 1001, Cal Civ Code 1572, 1710.

Informed consent was required. In fraud, Northorp and Hafif failed to disclose the unconscionable effect of the contract terms. Thus, the contract was void *ab initio*, from inception, even without rescission. Sylvester's signature was obtained by connivance of Northrop and Hafif. Hafif was jointly interested with Northrop because the settlement agreement allowed grossly disproportionate payments to Hafif.

Mere signature is insufficient for a valid contract. If the plaintiff did not fully comprehend the effect, a contract is deemed void from inception, *Wetzstein v. Thomasson*, 34 CA2d 554, 559, 93 P2d 1028 (1939). A void contract cannot be ratified by any act, *Colby v. Title Ins. & Trust Co*, 160 C 632, 644, 117 P. 913 (1911), *Cook v. King Manor & Convalescent Hosp*, 40 CA3d 782, 792, 115 CR 471 (1974). See: 17 *Am.Jur Contracts* sec. 218, 232. Even if the contract were not void *ab initio*, the contract is voidable because assent was obtained by fraud, Witkin, *Summary of Calif. Law*, 1973, p. 270.

The settlement agreement was void. Contracts are illegal, as against public policy, which have as their object to exempt anyone from responsibility for his own fraud or violation of law, *Calif. Civ. Code* 1668. Illegality may be found on principles of public policy, even without statutory provision or directly relevant case law, *Grimes v. Allen*, 93 CA2d 653, 656, 209 P2d 651 (1949). Since an illegal contract is void, ratification is not possible by operation of law.

A contract is illegal if contrary to express statutes, contrary to the policy of express statutes, or contrary to good morals, *Calif. Civ. Code* 1667. A contract whose object is unlawful is void, 12 CalJur2d 269. Also see: *Witkin Summary,* Contracts, sec 436, 461.

Fraud Voids the Dismissal. The dismissal was the result of fraud upon the Court. In fraud, Northrop and attorney Hafif failed to disclose Sylvester's opposition to the Court. The Killingsworth exception for required government approval does not apply, because Sylvester opposed the dismissal at the time of the dismissal hearing, although Northrop and Hafif misled the Court by asserting authorization to dismiss. Sylvester promptly rescinded and directed Hafif to oppose dismissal, but Northrop fraudulently failed to disclose this to the Court. (CR 419 Ex C, ER 19; CR 399 Ex G, ER 46; CR 399 Ex O, ER 44; CR 385, Northrop ER Ex. C.)

Sylvester formally rescinded his signature promptly after reading the settlement agreement (CR 419 Ex C, ER 19). and directed Hafif to oppose the dismissal. Thus, Hafif lacked authority to proceed with the dismissal, but Hafif failed to disclose his lack of authority to the Court. Thus, the dismissal is the result of fraud upon the Court.

Northorp was informed that Hafif did not have the authority to settle on behalf of his clients; Northrop knew that Sylvester had rescinded (Northorp ER Ex C). Northrop's failure to inform the Court was fraud. After the dismissal hearing, Sylvester moved to void abandonment of the *qui tam* claim, under Rule 60(b), but the court declined (CR 398, ER 49).

An agreement based on fraud is void. A dismissal based on a fraudulent settlement agreement is void. A void agreement cannot be ratified. Northrop and Hafif deceptively worded the settlement agreement to defraud the government and to wrongfully obtain government funds for themselves. The dismissal was based on fraud on the Court. Northrop and Hafif misrepresented to the Court that the *qui tam* claims were meritless, contrary to the fact that the claims had substantial value.

Northrop and Hafif were jointly interested in specific terms that would be advantageous to them and contrary to the interests of the government and Sylvester. Through connivance with Hafif and failure to disclose the full meaning of the settlement agreement, Northrop obtained Sylvester's signature through fraud. In fraud, Northrop failed to disclose, either in the settlement agreement or in any document filed with the court, that the government would be obligated to reimburse Northrop for the full cost of litigation due to abandonment of the qui tam claim.

In fraud, Northrop failed to disclose in the settlement agreement the specific amount for each plaintiff, with the surprising and unconscionable result that Hafif received

$723,841 from the $825,000 settlement, or 88 percent of the proceeds. Therefore, Northrop's failure to disclose essential terms in the settlement agreement is fraud, and result in a voidable contract subject to rescission.

V

The Decision was Based on an incorrect Standard of Review

The de novo standard of review is required. The de novo standard is applicable to motions to dismiss *qui tam* actions, *U.S. ex rel. Killingsworth,* 25 F.3d 715, 723 (9th Cir. 1994). This case turns on interpretation of statute, 31 USC 3730(b), resulting in the requirement for a de novo standard of review, *Anderson v. United States*, 966 F.2d 487, 489 (9th Cir. 1992).

Mixed questions of law and fact are reviewed *de novo*, *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985). Review of a motion to dismiss is a legal determination reviewed *de novo*, *Fort Vancouver Plywood v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). Appellate review should have independently considered the matter anew, as if no decision had been rendered on the matter below, *United States v. Silverman*, 861 F.2d 5712, 576 (9th Cir. 1988).

CONCLUSION

The Ninth Circuit decision raises significant Constitutional issues. The decision impermissibly intrudes on the executive function. Sylvester was denied procedural due process due to deception and gross malpractice by his attorney Hafif. Sylvester was denied freedom of speech because the dismissal prevented full recovery of damages from retaliation for his reporting of Northrop's fraud. In violation of federal supremacy, the Ninth Circuit applied state court decision rules, when conflicting federal law would produce a different result.

The Ninth Circuit decision conflicts with relevant decisions of other circuits. The Ninth Circuit stands conspicuously alone in the *Killingsworth* decision; no other circuit has relied on the *Killingsworth* holdings. By contrast, the Fifth Circuit holds that a purported release of rights granted under federal statute is void as against public policy, *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir 1987). Similarly, the Eighth Circuit requires strict scrutiny of a release of a federal claim, with requirements including several days to review the words and clear, unambiguous terms, *Lancaster v. Buerkle Buick Honda Co*, 809 F.2d 539 (8th Cir 1987).

For the reasons stated, this petition for writ of certiorari should be granted. Based on the relevant law, the Supreme Court should REMAND the case to the District Court for trial on the *qui tam* claim.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
C.A. No. 95-55220
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD R. SYLVESTER,
Plaintiff-Appellant,
UNITED STATES, ex rel.,
JEAN-FRANCOIS TRUONG; CURTIS DANE; TERRENCE F. SCHIELKE; EUGENE OTTAVIANO; RICHARD P. CROSWELL,
Plaintiffs,
v.
NORTHROP GRUMMAN CORPORATION,
a California corporation,
Defendant-Appellee.

UNITED STATES, ex rel., JEAN FRANCOIS TRUONG,
Plaintiff,
and
RICHARD CROSWELL,
Plaintiff-Appellant,
v.
NORTHROP GRUMMAN CORPORATION,
a California corporation,
Defendant-Appellee.
D.C. No. CV-88-0967-MRP
Filed July 10, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted June 3, 1996
Pasadena, California

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

INTRODUCTION

Richard Sylvester and Richard Croswell brought claims against Northrop Grumman Corporation for wrongful discharge and as qui tam relators under the False Claims Act. Their appeals have been consolidated. Sylvester appeals (1) the dismissal of his qui tam claim, (2) the denial of his motion for post-dismissal relief, and (3) the denial his motion for post-judgment relief. Croswell appeals the summary judgment for Northrop on his qui tam claim and the judgment as a matter of law for Northrop on his federal wrongful discharge claim. We affirm.

SYLVESTER DISCUSSION

I. The Dismissal Order

A. Fraud in the Inducement

Sylvester contends that there was collusion between Northrop and Hafif and that Sylvester signed the settlement agreement under the misguided assumption that he was only releasing his wrongful discharge claims. He argues that the

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

settlement agreement was induced by fraud, and therefore we should vacate the district court's dismissal of his qui tam claim.

Even when the underlying cause of action is federal, the construction and enforcement of settlement agreements are governed by principles of state contract law. *United Commercial Ins. v. Paymaster Corp.*, 962 F.2d 853, 857 (9th Cir. 1992). California law provides that "recision is available for a unilateral mistake, when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party." *Merced County Mut. Fire Ins. v. State*, 284 Cal.Rptr. 680, 684 (Cal.App. 1991). The implication of this rule is that a party who signs an agreement "generally is bound by its terms, even though he neither reads it nor considers the legal consequences of signing it," *Operating Eng'rs Pension Trust v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir. 1984) (applying California law), but if the other contracting party induces the signature by fraud, the signatory can rescind. See *id.* (citing *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 136 (4th Cir. 1967)).

Nothing in the record suggests that Northrop induced Sylvester's signature by fraud or had any idea that Sylvester had not read the settlement agreement. Since Hafif was Sylvester's lawyer and not the other contracting party, Sylvester's allegations that Hafif tricked him are unavailing. If Hafif lied to Sylvester about the contents of the settlement agreement, then Sylvester may have a state claim against Hafif but nothing more.

B. Void as against Public Policy

Sylvester contends that dismissal of his qui tam claim violated public policy because it was unfair to the government. But a party "'can no more repudiate a [settlement agreement] than he could disown any other binding contractual relationship."' *In re Springpark Assoc.*, 623 F.2d 1377, 1380 (9th Cir. 1980) (quoting *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978)). Once a party enters a settlement

agreement, "'the actual merits of the controversy become inconsequential"' to its enforcement. *Id.* The district court was not obligated to rescind the settlement agreement simply because Sylvester may have made a bad deal.

C. Government Consent

Sylvester contends that the district court erred in dismissing his qui tam claim because the government objected to the settlement agreement. The Federal Claims Act provides that a qui tam action "may be dismissed only if the court and the Attorney General give written consent to the dismissal . . . . It 31 U.S.C. § 3730(b)(1). We have held, however, that unless there is intervention, the government does not have an "absolute right" to bar dismissal. See *Killingsworth v. Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994). Congress intended "to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later intervention for good cause[.],, *Id.* The government did not try to intervene. Sylvester had full authority to agree to dismiss the government's claims with prejudice.

II. The Post-Dismissal Order

Sylvester filed a post-dismissal motion seeking to vacate the dismissal order. In his supporting declaration, Sylvester alleged that Hafif had misled him into signing the settlement agreement and that Hafif had failed to give him the money he was owed under the settlement agreement. The order signed by the district court held that Sylvester was bound by the settlement agreement, but it also found that Hafif had provided exemplary service and had not cheated Sylvester out of settlement proceeds. Sylvester contends that we should vacate the order; it seems his concern is that the district court's findings will have an estoppel effect on his state claims against Hafif. We decline to vacate the order. There is no question that the district court had jurisdiction to

determine whether the settlement agreement had been induced by fraud, and the district court made clear that it was not deciding Sylvester's attorney-client claims:

> MR. SYLVESTER: Okay. But then we say are each of those expenses valid and I say that is a matter not for this tribunal. That is a state court matter or a matter for arbitrators for the state bar to which this matter has been referred.
> THE COURT: But that is not my problem here.
> MR. SYLVESTER: Your problem is only whether or not --
> THE COURT: You are bound.

It is for the state court to determine the possible estoppel effect of the district court's findings.

III. The Order Denying Post-Judgment Relief

Sylvester filed a post-judgment motion seeking to vacate the dismissal order. F.R.C.P. 60(b) provides:

> . . . the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)..... (or] fraud (whether heretorfore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . .

In his F.R.C.P. 60(b) motion, Sylvester did not introduce any new evidence or raise any new arguments supporting his theory that Northrop had induced him to sign the settlement agreement by fraud. The district court did not abuse its discretion in refusing to vacate the dismissal order or in denying any the other relief Sylvester requested.

CROSWELL DISCUSSION

I. False Claims Act

A. Summary Judgment

To defeat a motion for summary judgment, the nonmoving party may not rely on "mere allegations." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It must raise "significant probative evidence" that is "sufficient" for the jury "to return a verdict for that party"; summary judgment may be granted if the evidence is "merely colorable." *Id.* at 249.

The False Claims Act provides that "[any person who . . . knowingly presents, or causes to be presented, to an officer of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . . is liable to the United States Government . . . ." 31 U.S.C. § 3729(a)(1). The district court did not err in holding that there was no genuine issue of material fact. Croswell fails to identify a block of engineer time billed to the government, state the nature of the work performed by the engineer, and explain why the charge was improper. There is no significant probative evidence from which a jury could infer that Northrop knowingly presented a false or fraudulent claim for payment.

II. Conflicting Interrogatories

Croswell contends that the district court erred in resolving conflicting answeres to special verdict interrogatories. F.R.C.P. 49(a) authorizes the district court to submit special verdict interrogatories to the jury. The Supreme Court held in *Gallick v. Baltimore & Ohio R. Co.* that when the jury answers interrogatories inconsistently, the judge has a duty under the Seventh Amendment to "harmonize" or "reconcile" them. 372 U.S. 108, 119 (1962). We applied *Gallick* in *Floyd v. Lewis* and held that although it would be a violation of the Seventh Amendment to disregard a jury's finding of fact, if the district

court "'has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury's necessarily conflicting answers to any other questions."' 929 F.2d 1390, 1398 (9th Cir. 1991) (quoting *White v. Grinfas*, 809 F.2d 1157, 1161 (5th Cir. 1987)). *Floyd* held that an inconsistent answer was "surplusage" because "the district court expressly stated on the special verdict form that the jury should not proceed to question 14 if it answered 'No' to question 13." *Id.* The special verdict interrogatories did not expressly state that the jury was not to proceed if it found that Northrop did not fire Croswell because of his "activities in furtherance of Mr.Troung's" lawsuit. But that fact is not dispositive. Question II.B. addressed in precise terms a necessary element of Croswell's federal wrongful discharge claim. A negative answer was meant to terminate further inquiry; the jury's answers to the remaining questions were surplusage.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
C.A. No. 95-55220

RICHARD R. SYLVESTER,
Plaintiff-Appellant,

UNITED STATES, ex rel.,
JEAN-FRANCOIS TRUONG; CURTIS DANE; TERRENCE F. SCHIELKE; EUGENE OTTAVIANO; RICHARD P. CROSWELL,
Plaintiffs,
v.
NORTHROP GRUMMAN CORPORATION,
a California corporation,
Defendant-Appellee.

UNITED STATES, ex rel., JEAN FRANCOIS TRUONG,
Plaintiff,
and
RICHARD CROSWELL,
Plaintiff-Appellant,
v.
NORTHROP GRUMMAN CORPORATION,
a California corporation,
Defendant-Appellee.

D.C. No. CV-88-0967-MRP

Filed Sept. 25, 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing; Judges Fernandez and Thomas have voted to reject the suggestion for rehearing en banc, and Judge Farris so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV-88-0967-MRP (JRx)

UNITED STATES, ex rel.,
JEAN-FRANCOIS TRUONG, et al.,
Plaintiff,
v.
NORTHROP CORPORATION,
Defendant

Filed August 30, 1994
Clerk, U.S. District Court
Central District of Claifornia
By *s/TY* Deputy

ORDER GRANTING PARTIAL DISMISSAL PURSUANT TO SETTLEMENT

This matter having come before the Court at a hearing on August 29, 1994, on the Motion of Defendant Northrop Grumman Corporation for Partial Dismissal Pursuant to Settlement, and this Court having considered the Motion and Memorandum, the Exhibits and declaration filed in support, the Notice of Opposition of the United States to Proposed Settlement and the defendant's; response thereto, and the record in the case;

and the court having determined that the settlement is fair, just and reasonable under all the circumstances, it is hereby

ORDERED, that the Motion for Partial Dismissal Pursuant to settlement be, and hereby is, granted, and it is further.

ORDERED, that, pursuant to Rule 41(a) and (b) and 31 U.S.C. 3730(b)(a), all portions of the Fourth Amended Complaint (except for the "Mantech" claim in the First Cause of Action with was previously dismissed by the Court on December 28, 1993, and the Sixth, Seventh and Eighth Causes of Action) are hereby dismissed with prejudice as to all plaintiffs both in their individual capacities and in their capacities as qui tam relators, and as to the United States.

August 30, 1994

s/ Mariana P. Pfaelzer
Honorable Mariana P. Pfaelzer
United States District Court

APPENDIX D

Constitutional Provisions

"All legislative Powers herein granted shall be vested in a Congress of the United States...." *U.S. Constitution*, Article I, Section 1.

"The Congress shall have the Power ... To make all Laws which shall be necessary and proper ...." *U.S. Constitution*, Article I, Section 8.

"The executive Power shall be vested in a President of the United States of America..." *U.S. Constitution*, Article II, Section 1.

"Congress shall make no law ... abridging the freedom of speech or of the press ... *U.S. Constitution*, Amendment I.

"No person shall be ... deprived of ... property, without due process of law ..." *U.S. Constitution*, Amendment V.

APPENDIX E

Federal Statutes

11 U.S.C. 3730

(b) Actions by private persons. (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.....

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action ...

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee ... in furtherance of an action under this section ... shall be entitled to all relief necessary to make the employee whole....

10 USC 2324

Allowable costs under defense contracts.

(e) (1) The following costs are not allowable under a covered contract:

(C) Costs incurred in defense of any civil or criminal fraud proceeding .... brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud ...

(k)(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States ... are not allowable as reimbursable costs under a covered contract if the proceeding

(A) relates to a violation of , or a failure to comply with, a Federal or State statute or regulation, and

(B) results in a disposition described in paragraph (2).

(2) A disposition ... of the following: .....

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of liability ...

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty ...

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A),(B),(C), or (D).

Supreme Court, U.S.
FILED
FEB 13 1997
CLERK

No. 96-1138

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES EX REL. RICHARD R. SYLVESTER,

Petitioner,

v.

NORTHROP GRUMMAN CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

18 pp

CORPORATE DISCLOSURE STATEMENT

Northrop Grumman Corporation ("Northrop") hereby advises the Court that it has shares publicly traded. Northrop currently has no parent corporation, nor does it have any subsidiaries or affiliates which have issued shares to the public. In May 1994, Northrop Corporation changed its name to Northrop Grumman Corporation.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Northrop Grumman Corporation ("Northrop") requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Ninth Circuit, C.A. No. 95-55220 (July 10, 1996). The decision of the Court of Appeals is not published, but is attached as Appendix A to the petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was based on the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, and specifically § 3730(b) & (h), and 28 U.S.C. § 1331. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Petitioner Richard R. Sylvester brought both (a) claims for wrongful discharge (the "personal claims") and (b) *qui tam* claims in the name of the United States (the "*qui tam* claims"), under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* [CR 137]. Pursuant to 31 U.S.C. § 3730(b)(2), the United States declined to intervene in the action. *See* Notice of Declination of Appearance by the United States [CR 24]; Notice of Election by the United States Declining Intervention [CR 133]. On June 23, 1994, at the end of an all-day mediation attended by Sylvester

and presided over by a highly-respected, neutral mediator, Sylvester signed a Settlement Agreement with Northrop in which he and three co-plaintiffs agreed to dismiss their personal and *qui tam* claims in exchange for an aggregate payment, to be distributed among the plaintiffs according to their own agreements. *See* Declaration of John T. Boese [CR 385]; Settlement Agreement and General Release [CR 381 Ex. 3].

Sylvester subsequently asserted "buyer's remorse" and asked his lawyer and the District Court to rescind the agreement, claiming that he had not actually read the agreement before he signed it. [CR 419 Ex. K]. The District Court dismissed the action pursuant to the Settlement Agreement. Petition App. C. Sylvester then filed post-judgment motions under Fed. R. Civ. P. 60(b), which the District Court denied. [CR 417, 418 & 434; CR 417]. On appeal, the Court of Appeals affirmed the dismissal of Sylvester's action and denial of his post-judgment motions.

REASONS FOR DENYING THE PETITION

The Petition does not present grounds justifying a writ of certiorari. Sylvester fails to identify any significant issue at stake in this case, any reason to believe the courts below departed from the accepted and usual course of judicial proceedings, or any conflict among the Courts of Appeals. Sylvester admits that he signed a Settlement Agreement waiving *all* of his claims against Northrop in exchange for money and other valuable consideration. He argues, however, that his *qui tam* claims,

brought in the name of the United States under the False Claims Act, should not have been dismissed pursuant to the settlement, because Sylvester's lawyer did not adequately represent Sylvester's interests, because the Attorney General did not consent to the dismissal and because the agreement was unfair to the United States. These arguments are without factual or legal foundation and do not merit review by this Court.

First, Sylvester's belated change of heart about the wisdom of the settlement and his current dissatisfaction with his counsel present no novel issue of federal law and no grounds for further review of the decisions below. Second, this case does not, in fact, raise the issue whether the District Court could properly dismiss Sylvester's *qui tam* action over the Attorney General's objection, because the Attorney General did *not* object either (a) to dismissal of Sylvester's *qui tam* claims with prejudice *as to Sylvester* or (b) to the financial terms of the settlement. This Court, moreover, recently denied a petition for writ of certiorari by the United States which *did* raise the issue that Sylvester is trying to assert here. *See United States v. Northrop Corporation*, ___ U.S. ___, 117 S. Ct. 296, 136 L. Ed. 2d 215 (1996). Finally, the Attorney General, not Richard Sylvester, is responsible for asserting the interests of the United States as to the fairness of a *qui tam* settlement to the government, and in this case the Attorney General has raised no objections whatsoever to the fact that the United States received no money out of the Settlement Agreement.

I. SYLVESTER IS BOUND BY HIS SIGNATURE

Sylvester admits that *he signed the Settlement Agreement*. Sylvester does not claim he misunderstood the terms of the settlement when he signed it. Yet Sylvester – who trumpets his professional credentials as a JD, MBA and Ph.D., a professional economist and frequent expert witness – lamely asserts that he did not actually *read* the agreement before he signed it and that his own lawyer duped him. This claim is both incredible and irrelevant. The disputes between Sylvester and his former attorney over the quality of representation he received have no place in this appeal: They are matters outside the scope of this lawsuit, have no bearing at all on Northrop – the only defendant in this action – and are properly handled through the state court action that Sylvester has already brought against his former counsel.

The settlement of this case presents no extraordinary or controversial issues justifying further review. The District Court had inherent authority to dismiss Sylvester's suit pursuant to a settlement agreement. *See, e.g., In the Matter of Springpark Assocs.*, 623 F.2d 1377, 1380 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980). Such a dismissal pursuant to settlement is reviewed on appeal only for abuse of discretion. "The district court's finding that [Sylvester] assented to the settlement and intended to be bound by it must be affirmed unless it is clearly erroneous." *Ahern v. Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988). " 'It is well recognized that settlement agreements are judicially favored as a matter of sound public policy.' . . . *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979)." *Ahern*, 846 F.2d at 48. Indeed, the Central

District of California, where this case was pending, now mandates that parties undergo settlement procedures and permits the parties to select their own settlement methods, such as the mediation which the parties undertook in this case. *See* Local Rule 23 of the Central District of California.

Sylvester cannot show that the District Court abused its discretion or was clearly erroneous in dismissing his claims, because Sylvester admitted that he signed the Settlement Agreement and failed to raise even a colorable allegation of fraud or unconscionability by Northrop. The Record before the District Court showed that the parties reached agreement on the settlement and executed the written Settlement Agreement at the end of an all-day mediation under the guidance of a well-known mediator, that Sylvester was represented by his counsel, and that Sylvester had at least the opportunity to make a considered judgment before signing the Settlement Agreement. Sylvester's claim that he failed to read the Agreement before signing does not excuse him from the agreement and its obligations. *See, e.g., Morta v. Korea Insurance Corp.*, 840 F.2d 1452, 1457-58 (9th Cir. 1988); *Alaska American Lumber Co., Inc. v. United States*, 25 Cl. Ct. 518, 529 (1992).

Sylvester, moreover, is a very sophisticated party. In his Petition, Sylvester states that he holds a JD from Loyola Law School, an MBA from the University of Southern California and a Ph.D. from the University of California at Los Angeles, and that he is an economist "listed for over a decade in Marquis' *Who's Who in the World, Who's Who in Finance and Industry,* and *Who's Who in the West.*" *See* Petition at 6-7. Sylvester also has taught business law courses at USC, UCLA, Loyola and in the

California State University system, has written textbooks in tax law, and has testified as an expert witness in United States and California courts. *See* Declaration of Richard R. Sylvester ¶ 2 [CR 419]. Sylvester cannot now plausibly claim that he failed to understand the meaning of the mediation process or the significance of signing his name to the Settlement Agreement.

Sylvester also argues that his decision to settle *all* his claims against Northrop is somehow rendered void because he asserts that his *qui tam* allegations had merit and were worth far more than he received in settlement. If that kind of argument had any bearing on the validity of a negotiated settlement, then no settlement would be secure. Sylvester may have decided after the fact that he had struck a "bad deal" but "[i]t is not the function of the Court . . . to relieve intelligent and educated people of the bargains they choose to strike." *Coleson v. Inspector General of Department of Defense*, 721 F. Supp. 763, 769 (E.D. Va. 1989). The actual merits of a claim are irrelevant to the validity of a party's knowing settlement of the case. *See, e.g., In the Matter of Springpark Assocs.*, 623 F.2d at 1380 (when the parties enter a settlement agreement " 'the actual merits of the controversy become inconsequential' "); *A.J. Industries, Inc. v. Ver Halen*, 75 Cal. App. 3d 751, 759-60, 142 Cal. Rptr. 383 (1977). Sylvester's claim that he struck a bad deal presents no grounds for review by this Court.

II. THE UNITED STATES DID NOT OBJECT TO DISMISSAL OF SYLVESTER'S *QUI TAM* CASE

This case does not raise the question whether the District Court can dismiss a *qui tam* action over the

Attorney General's objections, because, contrary to Sylvester's assertions, the Attorney General did not object to the dismissal of Sylvester's *qui tam* claims or to the fact that the settlement allocated no money to the *qui tam* claims and, therefore, provided no payment to the United States. Instead, the Justice Department submitted only a cursory, written objection to dismissal of the action *"with prejudice as to the United States."* The Justice Department did not appear at the District Court hearing to enforce the settlement, did not participate at all in Sylvester's appeal to the Ninth Circuit, and has not petitioned this Court for review of the decisions below. At no time has the Justice Department made any objection to the dismissal of *Sylvester's* claims pursuant to the settlement. Accordingly, the petition raises no issue for this Court to review.

Following the execution of the Settlement Agreement, Northrop filed its Motion for Partial Dismissal Pursuant to Settlement and served the motion on the Assistant United States Attorney who had been acting for the government on this case since its inception in 1988. [CR 376]. The United States Attorney then filed its "Notice of Opposition of United States to Proposed Settlement." *See* Appendix A hereto [CR 411]. In its Notice of Opposition, the government clearly stated that its *only* objection was that the parties sought dismissal with prejudice as to the United States on the *qui tam* allegations. The government had twice declined to intervene in the *qui tam* suit and had never sought to play any role whatsoever in the prosecution of Sylvester's claims, but pointed out that the order Northrop sought would permanently bar the government from pursuing the false claims allegations Sylvester had raised. The government

stated: "Accordingly, the government objects to the proposed settlement *to the extent* that it would dismiss the False Claims Act allegations with prejudice as to the United States." [CR 411 at p. 2 (emphasis added)]. The government raised no other objection or concern in response to Northrop's motion to dismiss the action.

Moreover, when Northrop moved for entry of final judgment, the United States made no appearance and raised no objection. When Sylvester filed for appeal, the United States again made no appearance and did not join the appeal.

Accordingly, the United States determined not to prosecute this action against Northrop, not to object to the dismissal of Sylvester's claims, and not to appeal the dismissal of Sylvester's false claims allegations with prejudice. The Attorney General raised no substantive objection to the settlement. Sylvester, therefore, cannot accurately argue that this Court should grant his petition because the United States did not consent to the dismissal of his claims against Northrop.

In addition, this Court recently denied a petition for writ of certiorari by the United States in a case that *did* squarely raise the issue Sylvester tries to rely upon in his petition. In *United States ex rel. Killingsworth v. Northrop Corporation*, 25 F.3d 715 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 117 S. Ct. 296, 136 L. Ed. 2d 215 (1996), the Ninth Circuit ruled that, where the United States did not intervene in the case, the District Court may dismiss a *qui tam* action under the False Claims Act pursuant to a settlement between the private plaintiff and defendant, even if the United States objects to the settlement, so long

as the District Court provides the government an opportunity to present its objections. 25 F.3d at 720-23. In *Killingsworth*, unlike the present case, the United States objected to the financial terms of the settlement, pressed its objections before the District and Circuit Courts, and petitioned this Court for writ of certiorari. This Court denied the petition.

Sylvester also argues that this case presents a split in the Courts of Appeal because other Circuits have not followed the Ninth Circuit's holding in *Killingsworth* that District Courts can, in appropriate circumstances, dismiss a *qui tam* action over the government's objection. This argument is baseless. Even if this case did present the issue decided in *Killingsworth*, there is no split or disagreement in the Circuit Courts, because no other Circuit has addressed this issue. Sylvester fails to identify any decision from another Circuit in conflict with the Ninth Circuit's decision in the present case. *See* Petition at 18-19, 25.

III. SYLVESTER HAS NO STANDING TO ARGUE THAT THE SETTLEMENT IS UNFAIR TO THE UNITED STATES

Sylvester argues that this Court should review the dismissal of his *qui tam* action because the Settlement Agreement was unfair to the United States in that it provided for no payment to the government on Sylvester's *qui tam* claim. This argument is frivolous. There is no dispute that the United States received notice of the Settlement Agreement and was fully apprised of its terms. The United States made no objection to the financial

terms of the settlement and has never suggested to any Court or party that it finds the agreement unfair or inappropriate.

Normally, only the Attorney General and her designees may represent and prosecute actions for the United States. The standing of a *qui tam* relator to bring an action in the name of the United States rests on the statutory "assignment" of the government's cause of action to the relator through the express *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b). *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747-49 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). In assigning certain rights to the private plaintiff, the Act does not make a wholesale transfer of power from the Attorney General to the *qui tam* relator. *Id.* at 760. Instead, the Act delineates the rights and powers of the private relator, and the rights and powers of the Attorney General, to act on behalf of the United States in connection with such actions. Among the authority which the Act allocates to *the Attorney General* is the right to object to a settlement reached by the private relator and defendant on the grounds that the settlement does not give the government a fair share of the settlement. *Killingsworth*, 25 F.3d at 723. It is precisely such reservations of power to the Attorney General that, according to the Ninth Circuit, save the *qui tam* provisions from violating the constitutional Separation of Powers by giving too much governmental power to private prosecutors. *Id.* at 724 (citing *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992) and *Kelly*, 9 F.3d at 753 n.10). The False Claims Act does not authorize the relator to second-guess and override judgments of the Attorney

General in exercising – or choosing not to exercise – those powers which the Act allocates to the Attorney General. Sylvester, therefore, has no standing to object to the settlement on the grounds that it is unfair to the United States.

Moreover, even if he did have standing to avoid his own commitments by pleading the interests of the United States, Sylvester's argument is utterly self-contradictory: if Sylvester does, as he claims, stand in the shoes of the Attorney General in this case, then he bound the United States by signing the Settlement Agreement. Sylvester cannot simultaneously claim the right to speak for the government *and* the right to disavow his own actions in the name of the government.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 12, 1997

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.*, JEAN-FRANCOIS TRUONG, Plaintiffs, v. NORTHROP CORPORATION, a California Corporation, Defendant.	NO. CV 88-0967-MRP(Rx) NOTICE OF OPPOSITION OF UNITED STATES TO PROPOSED SETTLEMENT

The United States files this Notice of Opposition to Proposed Settlement pursuant to the requirements of this Circuit's construction of the relevant portions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*. See *U.S. ex rel., Killingsworth v. Northrop Corp.*, 25 F.3d 715, (9th Cir. 1994).

The United States has monitored the course of this litigation since declining intervention. The government has reviewed the terms of the proposed settlement and has solicited information and explanations from the parties regarding the terms of the agreement.

The proposed agreement allocates 100% of the proceeds to the relators' personal claims and nothing to the resolution of the False Claims Act counts. Nonetheless, the settlement purports to dismiss *with prejudice* as to the United States the False Claims Act allegations, thus forever baring [sic] the government from pursuing the allegations should changed circumstances so warrant. Accordingly, the government objects to the proposed settlement to the extent that it would dismiss the False Claims Act allegations with prejudice as to the United States.

Unlike the situation in *Killingsworth*, giving effect to the United States' objection here does not deprive the relator of any monetary recovery or require that the case be litigated further, but merely requires that the terms of the otherwise agreed-upon dismissal be modified.

DATED: August 18, 1994.

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United States Attorney
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/s/ Howard F. Daniels
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